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PUBLIC VERSION
Docket: 21-CRB-0001-PR (2023-2027)
Filing Date: 05/24/2022 09:45:12 PM EDT

Before the
UNITED STATES COPYRIGHT ROYALTY BOARD
Washington, D.C.

In the Matter of:	)	
	)	
DETERMINATION OF RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (*Phonorecords IV*)	)	**Docket No. 21-CRB-0001-PR (2023-2027)**

AMAZON'S MOTION FOR SANCTIONS AGAINST COPYRIGHT OWNERS

The Judges should sanction the Copyright Owners for their acknowledged failure to comply with the Judges' May 2, 2022 Order Granting in Part and Denying in Part Services' Motion to Compel Production of Documents ("Order"). The Judges compelled the Copyright Owners to produce "no later than ten days from the date of th[e] Order," among other things, (1) financial analyses related to the advances publishers pay songwriters and (2) documents related to valuing song-catalog acquisitions. Order at 5. Based on the conclusion that "publisher-songwriter contracts appear to be irrelevant," however, the Judges allowed the Copyright Owners to moot part of the Order by filing, within that same ten days, a revised Written Direct Statement "that withdraws any argument, evidence, and testimony regarding the level of songwriter income derived from publishing contracts." *Id.* at 3, 5.

The Copyright Owners neither filed a revised Written Direct Statement nor completed the production the Order required. Instead, in their statement of search efforts, the Copyright Owners repeatedly admitted their failure to comply with the Order. As of the production deadline the Judges ordered, three publishers had produced *no documents* about songwriter income and another publisher had produced no documents from after 2018 (Request No. 155). Six publishers similarly had produced *no documents* about catalog acquisition and valuation

(Request No. 30). On both subjects, the Copyright Owners criticized the Order for being too burdensome and claimed they could not complete production for several more weeks. But the Copyright Owners never asked the Judges for relief from the compliance deadline, nor did they alert the Services in advance to their claimed inability to meet the deadline. The Copyright Owners instead engaged in self-help, granting themselves lengthy extensions of the Judges' deadline. And as of today, eight full days after the Judges' deadline, these publishers still have not produced the documents the Judges ordered them to produce.

With the hearing only six weeks away, the Services are left waiting on responsive documents necessary to rebut the Copyright Owners' assertions. And the Copyright Owners have not even provided the Services with a date certain by which they will finally comply with the Order. The Copyright Owners' decision to flout the Judges' Order, particularly this late in the proceeding, prejudices Amazon's ability to effectively litigate this case. The Judges should sanction the Copyright Owners for their unexcused non-compliance with the Order by striking all the Copyright Owners' testimony to which Requests No. 30 and 155 directly relate.

BACKGROUND

Amazon, Spotify, and Pandora moved to compel the production of documents directly related to the Copyright Owners' witnesses' Written Direct Statement, which argued: (1) increased mechanical-royalty rates are essential to protect publishers' ability to continue to fund and recoup advances, which they claim are vital to ensuring that songwriting is a viable career option; and (2) songwriter revenues have collapsed in the era of interactive streaming services, threatening the songwriting industry. Order at 1. For months, the Copyright Owners refused to produce documents responsive to the Services' Requests bearing on these and other topics, evading their discovery obligations by stonewalling on several requests and

inappropriately narrowing others to only one publisher. *Id.* at 4.[1] That conduct forced the Services to move to compel. The Judges granted that motion in full, except for Request No. 155, which they granted conditionally by allowing the Copyright Owners to moot the motion by withdrawing the testimony to which that Request related. *See id.* at 5. The Judges gave the Copyright Owners "ten days from the date of th[e] Order" to complete their production or, as to Request No. 155, to file a revised Written Direct Statement. The Judges also ordered the Copyright Owners to provide a statement of search efforts. *Id.*

At the end of that 10-day period, the Copyright Owners did not file a revised Written Direct Statement. Nor did they complete their compelled production. Instead, the Copyright Owners submitted a statement of search efforts that repeatedly admitted their failure to comply with the Order and argued that the Order was unduly burdensome. *See* Copyright Owners' Statement of Search Efforts (May 16, 2022) ("Statement of Search Efforts"). The Copyright Owners did not specify when they would finish producing and asserted that some publishers would need [redacted] to even *identify* responsive documents. *Id.* at 3. The Copyright Owners said nothing about their non-compliance to the Services before filing that statement, nor did they seek leave from the Judges to extend the deadline.

The Statement of Search Efforts filed on the same day as the deadline for production reveals extensive non-compliance with the Order.[2]

[1] *See* Order at 4 ("Copyright Owners improperly narrowed their responses. Even though only one UMPG witness testified regarding the value of catalog acquisitions, that does not mean other publishers would not or do not have documents relating to their own acquisition of catalogs.").

[2] Some publishers did make productions on May 16, 2022 in compliance with the Judges' Order, including in regards to Request Nos. 155 and 30. *See* Statement of Search Efforts. However, that does not excuse the other publishers from their acknowledged non-compliance with the Order, particularly since the various publishers were able to work on their individual productions in parallel with each other.

Songwriter Advances (Request No. 155):

- Sony Music Publishing ("Sony") "[redacted]" *Id.* at 6-7.
- Warner Chappell Music's ("WCM") efforts "[redacted]." *Id.* at 9.
- BMG Rights Management ("BMG") is "[redacted]" of information regarding songwriter advances. *Id.* at 2.
- Kobalt Music Publishing America ("Kobalt") "[redacted]" *Id.* at 3.

Song Catalog Acquisitions and Valuation (Request No. 30):

- Sony is still in the process of "identifying and producing responsive files," and says that this is the same "process described above with respect to songwriter advances," which it estimated would take [redacted]. *Id.* at 7.
- Universal Music Publishing Group says that its document identification and collection "[redacted]," with "[redacted]." *Id.* at 8.
- WCM says that its "[redacted]" "[redacted]." *Id.* at 9-10. It did not identify any estimated time to completion.
- BMG has "collected the catalog acquisition files" and "provided the files to counsel for review," and "[r]esponsive documents will be produced expeditiously after the completion of such review and, should any information require notice, expiration of the applicable notice period to the counterparty." *Id.* at 2.
- Kobalt is undertaking the same "process described above with respect to songwriter advances," which is estimated to take [redacted] to identify responsive documents. *Id.* at 3, 4.
- Round Hill Music "[redacted]" to complete "identifying and producing valuation documents." *Id.* at 6.

ARGUMENT

The Order required (at 5) the Copyright Owners to produce responsive documents "no later than ten days from the date of this Order." The Copyright Owners admit they failed to comply with the Order. And they did not seek an extension of the deadline from the Judges, instead unilaterally granting one to themselves. The Judges should sanction the Copyright Owners for their blatant disregard of the Order. Specifically, the Judges should strike all argument, evidence, and testimony from the Copyright Owners' direct and rebuttal submissions discussing songwriter earnings and advances that publishers pay to songwriters, as well as song catalog acquisitions or valuation. The Judges should also prohibit the Copyright Owners from making arguments about these topics during the hearing. If the Judges grant this Motion, Amazon will submit a full list of the specific testimony the Judges should strike.

Such a sanction is necessary to remedy the prejudice to the Services' ability to prepare responses to those arguments while lacking relevant documents in the short period before the hearing begins. This sanction is also necessary to deter participants in the future from engaging in self-help in lieu of complying with the Judges' discovery orders. If participants are permitted to violate the Judges' discovery orders whenever they decide that compliance is too burdensome – which is what the Copyright Owners admit happened here – the discovery process will break down. Amazon successfully moved to compel on these topics because Amazon needs this discovery to test the Copyright Owners' assertions about advances and catalog acquisitions. The Judges agreed and ordered the Copyright Owners to comply. Yet the Copyright Owners refused because, in essence, they simply disagree with the Judges' Order. Such conduct should not be tolerated, especially this late in the proceeding.

I. The Judges Have Inherent Authority to Sanction the Copyright Owners for Violating the Order

The Judges have inherent authority to sanction the Copyright Owners for their failure to comply with the Judges' Order. The Judges have statutory authority to "make any necessary procedural or evidentiary rulings in any proceeding under this chapter." 17 U.S.C. § 801(c); *see also id.* § 803(b)(6)(C) (granting the Judges authority to order discovery and compel production of documents). The D.C. Circuit has recognized the Judges' inherent authority to "impose discovery sanctions" in response to discovery violations, which arises "as a consequence of [the Judges'] statutory grant of authority to oversee discovery." *Indep. Producers Grp. v. Libr. of Cong.*, 792 F.3d 132, 138 n.4 (D.C. Cir. 2015) (citing 17 U.S.C. §§ 801(c), 803(b)(6)(C)).

II. The Copyright Owners' Violation of the Order Warrants Striking the Relevant Testimony

A. The Copyright Owners' Failure to Comply with the Judges' Order Is Sanctionable

The Copyright Owners' conduct is sanctionable. The Judges' Order imposed a clear deadline for compliance. There is no dispute that numerous publishers failed to produce documents responsive to Request Nos. 30 and 155 by that deadline. The Copyright Owners could have sought an extension if compliance proved burdensome, but they did not. The Copyright Owners also could have approached the Services to seek consent for an extension, but they did not. Alternatively, they could have avoided the burden of responding to Request No. 155 by heeding the Judges' suggestion that they withdraw their irrelevant testimony about songwriter income. Instead, they unilaterally granted themselves an extension.

In contrast, Amazon complied with an order compelling production of voluminous information in 10 days, even though doing so was a mammoth undertaking that consumed

significant resources.[3] Amazon argued in opposing that motion that compliance would be unduly burdensome, but the Judges rejected our argument. So Amazon did what was necessary to comply with the Judges' deadline, even though it incurred substantial (and, in Amazon's view, undue) burden in doing so. The Copyright Owners did the opposite. Criticizing the Judges for the alleged "imbalance in both the discovery burdens that have been imposed and in the obligation to provide certifications of compliance," the Copyright Owners decided that they simply would not produce documents by the Judges' deadline. Statement of Search Efforts at 1 n.1. So they gave themselves extra time – in many cases several weeks extra. *Id.* at 2-4, 6-10. Even now, they have not complied with the Order or said when they intend to do so.

If the Copyright Owners faced burdens that made compliance with the Order impossible, the proper remedy was to seek relief from the Judges. Whatever the merits of the burden claim they now make, their self-help was improper. Yet any burden the Copyright Owners now face is also a problem of their own making. The Copyright Owners had *many months* to produce documents responsive to the Services' Requests. Indeed, the Copyright Owners first put these topics at issue in October 2021 when they submitted direct testimony addressing them, and the Copyright Owners should have produced responsive documents about these topics months ago. They did not. Instead, they improperly withheld documents – repeatedly forcing Amazon to file motions to compel – and apparently only began collection efforts once the Judges ordered them to. The time crunch they face is thus a consequence of their own conduct.

Further, for Request No. 155, the Judges invited the Copyright Owners to withdraw their irrelevant songwriter testimony and thereby moot the Order as to that Request. Yet the

[3] *See* Order On Copyright Owners' Mot. To Compel Prod. Of Documents And Info. From Services Concerning Their Rate Proposals (Apr. 26, 2022). In response to that order, Amazon produced over 21,000 pages of documents.

Copyright Owners refused the invitation. The Copyright Owners' insistence on advancing irrelevant testimony – even after the Judges twice invited them to withdraw it, *see also* Order Granting in Part Google's Mot. to Compel Documents and Info. From Copyright Owners at 5-6 (Apr. 28, 2022) ("Order on Google's Mot. to Compel") – is what created the burden to which they now object. The Copyright Owners cannot credibly blame Amazon for their own choice to put at issue topics that "appear to be irrelevant to the matter before the Judges." Order at 5.

When Amazon asked the Copyright Owners for an explanation of their violation of the Order, the Copyright Owners primarily argued that the Order was too burdensome to comply with. When Amazon explained that this alleged burden does not justify the self-help tactic of unilaterally taking an extension, the Copyright Owners' only response was that Google allegedly did something similar in response to another order. But as Amazon understands it, Google discovered that compliance with one of the Judges' orders would require its engineers to write a script to access archived information (which was ultimately found to total more than 230 terabytes of data), making production within the order's 10-day deadline literally impossible. Prior to the production deadline, Google reached out to the Copyright Owners to inform them that while 3+ terabytes of unarchived, responsive data would be produced by the deadline, the archived data could not be produced within that time frame. The Copyright Owners raised no objection. Had they objected, Google was prepared to seek an emergency extension from the Judges. That situation is distinguishable in several ways from what the Copyright Owners did here – most notably, because the Copyright Owners never notified the Services in advance or sought consent to any extension. But no matter what other participants allegedly may have done, it is no justification for the Copyright Owners' conduct. The Order's deadline was binding on the Copyright Owners, and their refusal to comply has substantially prejudiced Amazon.

The Judges should sanction the Copyright Owners for their knowing violation of the Order. Sanctions are necessary to remedy the prejudice to the Services, which cannot adequately prepare responses to core themes in the Copyright Owners' Written Direct Statement without a full complement of relevant documents. Waiting even longer for the Copyright Owners to produce the documents is not a viable option, with the hearing beginning in six weeks and the Copyright Owners claiming that even *identifying* some publishers' responsive documents will take several more weeks. Sanctions are also necessary to deter participants from disobeying the Judges' discovery orders and engaging in self-help as a remedy.

B. Striking the Testimony Implicated by the Judges' Order is the Appropriate Sanction for Copyright Owners' Conduct

The appropriate sanction for the Copyright Owners' disregard of the Judges' Order is to strike from the record all of the Copyright Owners' argument, evidence, and testimony related to: (1) "[s]ongwriters' earnings," including "[p]ublisher [a]dvances to [s]ongwriters," Order at 2, 5; and (2) song catalog acquisition and valuation, *id.* at 5. The Judges should also prohibit the Copyright Owners from introducing any argument or evidence on these subjects at the hearing.

The sanctions available to the Judges include dismissing a party, striking testimony, or imposing an adverse inference. Order Den. MPAA and SDC Mots. for Sanction at 5, 8-10, Dkt. Nos. 2012-6 CRB CD 2004-09 (Phase II); 2012-7 CRB SD 1999-2009 (Phase II) (Mar. 12, 2019). The Judges have previously determined they "lack express statutory authority to impose attorney's fees" as a sanction and have "declined to impose the sanction of disqualification or debarment in the absence of regulations governing how, and under what circumstances they may do so." *Id.*

Of the available sanctions, striking the testimony implicated by the Copyright Owners' discovery misconduct is the most proportional. The Judges have reached that conclusion in

similar situations, disallowing claims based on the party's "failure to produce evidence in discovery in th[e] proceeding relating to" those claims. Mem. Op. and Ruling on Validity And Categorization Of Claims at 39, (Phase II), Dkt. Nos. 2012-6 CRB CD 2004-09 (Phase II); 2012-7 CRB SD 1999-2009 (Phase II) (Mar. 13, 2015). The Judges have explained that such a sanction in response to a party's "failure to produce a document that was responsive to [the] discovery requests" at issue was appropriate, as it was "tailored to [the] specific discovery violation," and the Judges "dismissed only those claims that were affected by . . . failure to disclose materials in discovery." Order Den. IPG Third Mot. for Modification of Mar. 13, 2015 Order at 5, 7, Dkt. Nos. 2012-6 CRB CD 2004-09; 2012-7 CRB SD 1999-2009 (Phase II) (June 1, 2016).

The D.C. Circuit affirmed the Judges' decision in the *Cable Phase II* proceeding to exclude several exhibits as a sanction for a party's failure to produce all relevant documents in response to an order from the Judges. The D.C. Circuit concluded that excluding the evidence as "an evidentiary sanction [was] an entirely appropriate response . . . for violating the discovery order." *Indep. Producers*, 792 F.3d at 138-39. Here, too, striking the Copyright Owners' testimony affected by the failure to disclose the materials is an appropriate sanction.

The Judges' prior decisions also match federal court precedent recognizing that when parties "ignore[] a clear order . . . some sanction is appropriate." *United States v. Pfizer, Inc.*, 188 F. Supp. 3d 122, 137 (D. Mass. 2016), *aff'd sub nom.* 847 F.3d 52 (1st Cir. 2017). Federal Rule of Civil Procedure 37 authorizes courts to sanction a party that violates a discovery order, including by prohibiting a party "from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence" or by "striking pleadings in whole or in part." Fed. R. Civ. P. 37(b)(2)(A). Federal courts accordingly issue similar sanctions the Services seek

here, striking evidence from the record, *Pfizer*, 188 F. Supp. 3d at 136-37, or precluding the violating party from asserting certain facts, *see UBS Int'l Inc. v. Itete Brasil Instalacoes Telefonicas Ltd.*, 2011 WL 1453797, at *3-4 (S.D.N.Y. Apr. 11, 2011) (sanction "prevents [the violating party] from benefitting in any way from their noncompliance but does not inhibit them from advancing their remaining argument"). The same remedy is warranted here.

C. The Judges Should Strike All Testimony Related to Requests No. 30 and 155

As a sanction for the Copyright Owners' violation of the Order compelling them to produce documents responsive to Request No. 155, the Judges should strike at least the following arguments, documents, and testimony containing assertions about songwriter revenue and advances:

- Written Direct Testimony of JW Beekman ¶ 18 ("Beekman WDT") ("[redacted]."); *id.* ¶¶ 19-20, 22, 23 (describing how UMPG determines advances, and concluding "UMPG's payment of advances" is "crucial to the signing and development of songwriters").

- Written Direct Testimony of Peter Brodsky ¶ 28 (advances "provide songwriters with financial support so that they can concentrate on developing their craft and creating [] musical compositions," "are critical to the survival of songwriters," "ease the financial challenges songwriters face by helping to fund the everyday requirements of the songwriter's career" and "make songwriting a more sustainable career choice"); *id.* ¶ 30 (describing how Sony determines advances).

- Written Direct Testimony of Annette Yocum ¶ 4 ("Yocum WDT") ("Every year, Warner Chappell pays [redacted]" and without publishers willing to make advances "the public will be deprived of great songs that will never be written (or if written, will never be heard)."); *id.* ¶ 27 ("[redacted] . . ."); *id.* ¶ 28 ("songwriters need the advances that music publishers provide to pay their day-to-day expenses").

- Copyright Owners' Intro. Mem. at 5 ("Advances are the lifeblood of the songwriting industry, providing songwriters necessary funds to cover living costs so that they have the time required to create songs instead of having to work in other activities. . . . Yet the ability of this advance system to meet the needs of songwriters is impeded, largely due to low royalties from streaming.").

This remedy is especially proper because the Judges have twice held that this testimony appears irrelevant. *See* Order at 5; Order on Google's Mot. to Compel at 5-6. As the Judges pointed out, the songwriters are not the hypothetical sellers at issue in this proceeding – the publishers are. *See* Order at 2 ("A songwriter's contract with a publisher, including any agreement regarding advances, is a voluntary agreement to part with all or part of the copyright. . . . If the market or its structure disfavors songwriters, that is not a factor the Judges must consider in setting willing buyer-willing seller license values."). The Copyright Owners should not be permitted to persist in injecting irrelevant testimony into the case while refusing to comply with their discovery obligations concerning that testimony.

As a sanction for the Copyright Owners' violation of the Order compelling them to produce documents responsive to Request No. 30, the Judges should strike at least the following arguments, documents, and testimony containing assertions about "the value of catalog acquisitions," Order at 4:

- Beekman WDT ¶ 15 ("we have acquired new catalogues (such as the extraordinary Bob Dylan catalogue)").
- Yocum WDT ¶ 25 ("Where we have purchased a catalogue, including the songwriter's share, Warner Chappell will collect a higher percentage of income (although the higher percentage would be attributable to the songwriter share we have acquired) . . . ."); *id.* ¶ 27 ("In order to maintain the financial capability to discover and sign new songwriters, Warner Chappell must also retain its existing songwriters and/or acquire rights from songwriters previously signed to other publishers."); *id.* ¶ 28 ("Warner Chappell has no alternative but to . . . invest in acquiring song catalogues . . . .").

If the Judges grant this motion, Amazon will provide a comprehensive list of testimony that the Judges should strike. The sanction should also include striking Copyright Owners' rebuttal testimony related to these same topics. The Services sought similar documents in rebuttal discovery in response to the Copyright Owners' rebuttal testimony making similar

assertions. Masterman Decl.,[4] Ex. 1 (Amazon and Spotify's Set of Rebuttal Requests for Production of Documents to the Copyright Owners (May 3, 2022)),[5] at 21 (Rebuttal Request No. 65) (tracking Request No. 155, and seeking "All analyses, memoranda, presentations, studies, surveys, and research findings concerning the advances that Music Publishers pay to Songwriters."); *id.* at 16 (Rebuttal Request No. 27) (tracking Request No. 30, and seeking "All sales decks, prospectuses, securities filings, risk factor analyses, studies, and surveys concerning the sale and valuation of catalogs owned by Your members."). The Copyright Owners responded by stating their production in response to the Order would include documents responsive to those rebuttal requests. Masterman Decl., Ex. 3 (Copyright Owners' Responses and Objections to the First Set of Rebuttal Requests for Production from Amazon.com Services LLC and Spotify USA Inc. (May 13, 2022)), at 34 (Response to Rebuttal Request No. 65) ("Copyright Owners will not be producing documents in response to this Request, though documents responsive to this Request will be produced in response to the May 2, 2022 Order Granting in Part and Denying in Part Services' Motion to Compel Production of Documents in this proceeding"); *id.* at 17 (Response to Rebuttal Request No. 27) (similar).

As shown above, the Copyright Owners have failed to comply with the Order, and that failure is similarly impeding the Services ability from preparing responses to these same arguments raised in the Copyright Owners' Written Rebuttal Testimony. The Judges' remedy should be tailored to cure the prejudice that Amazon has suffered in both phases of the case.

[4] All citations to the "Masterman Decl." in this Motion refer to the Declaration of Clayton J. Masterman accompanying Services' Motion to Compel the Copyright Owners to Produce Documents (May 24, 2022).

[5] Amazon and Spotify made non-material corrections to the RFPs on May 16, 2022. Amazon and Spotify originally served their RFPs on May 3, 2022.

CONCLUSION

The Judges should grant the Motion.

Dated: May 24, 2022

Respectfully submitted,

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Proof of Delivery

I hereby certify that on Tuesday, May 24, 2022, I provided a true and correct copy of the Amazon's Motion for Sanctions Against Copyright Owners (PUBLIC) to the following:

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